

## **RIGHT TO COUNSEL — Withdrawal of invocation of right to counsel**

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When a suspect invokes his right to a lawyer, all questioning must cease.

*Edwards v. Arizona*, 451 U.S. 477, 481, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981).

However, a suspect may first invoke his right to counsel under either the Fifth or Sixth Amendment, and then choose to withdraw that invocation and speak to the police without an attorney. "Although *Miranda* rules are designed to protect defendants from being compelled to make statements, they also give defendants the 'right to choose between speech and silence.'" *State v. Smith*, 156 Ariz. 518, 523, 753 P.2d 1174, 1179 (App. 1987), *disapproved of on other grounds by State v. Jonas*, 164 Ariz. 242, 792 P.2d 705 (1990), *quoting Connecticut v. Barrett*, 479 U.S. 523, ---, 107 S.Ct. 828, 832 (1987). Once a defendant has invoked his right to counsel, the police must not question him further, unless and until the defendant himself has first chosen to reinitiate contact with the police. *Oregon v. Bradshaw*, 462 U.S. 1039, 1043-44, 103 S.Ct. 2830, 2833-34, 77 L.Ed.2d 405 (1983).

In *State v. Smith*, 193 Ariz. 452, 974 P.2d 431 (1999), Smith murdered an elderly couple and was arrested after a friend reported him to the police. A detective read Smith his *Miranda* rights and at first he agreed to talk to the police. However, when the police confronted him with incriminating evidence during the interrogation, he asked for an attorney and the police stopped the interrogation. As the police prepared to transport Smith to another facility, Smith said to the detective, "I don't see why I shouldn't just tell you." *Id.*, ¶ 11 at 456, 974 P.2d, ¶ 11 at 435. After Smith made this statement, the detective asked if he meant that he wanted to talk to the police again, and Smith

agreed. Smith then made some incriminating statements. On appeal, Smith argued that the trial court should have suppressed the statements he made after he had requested a lawyer because he had not "reinitiated contact with the police," citing *Edwards v. Arizona*, 451 U.S. 477, 481, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981). The Arizona Supreme Court rejected this argument, saying that Smith's statement "showed a desire for a discussion about the investigation." *Id.*, ¶ 23 at 458, 974 P.2d, ¶ 23 at 437. The Court explained that a defendant who has invoked the Sixth Amendment right to counsel may waive that right by reinitiating contact with the police:

When a suspect invokes his right to a lawyer, all questioning must cease. *Edwards v. Arizona*, 451 U.S. 477, 481, 101 S.Ct. 1880, 1883, 68 L.Ed.2d 378 (1981). However, if the suspect reinitiates contact with the police, he waives his rights and questioning can continue. *Oregon v. Bradshaw*, 462 U.S. 1039, 1043-44, 103 S.Ct. 2830, 2833-34, 77 L.Ed.2d 405 (1983); *State v. Burns*, 142 Ariz. 531, 535, 691 P.2d 297, 301 (1984) (holding that defendant reinitiated contact when he said, "Well, I want to tell you what happened."). In *Bradshaw*, the Court held that the defendant's question, "Well, what is going to happen to me now?" evidenced "a desire for a generalized discussion about the investigation." *Bradshaw*, 462 U.S. at 1045, 103 S.Ct. at 2835. Thus, the defendant in that case reinitiated contact after invoking his right to a lawyer.

Likewise, in this case, Smith said, "I don't see why I shouldn't just tell you." [Citation omitted.] This, too, showed a desire for a discussion about the investigation. [The detective] removed any doubt as to Smith's intent by clarifying that Smith's statement was an indication that he now wanted to speak. . . .

If the accused has been given his *Miranda* warnings and makes a voluntary, knowing, and intelligent waiver of those rights, the statements are admissible. [*Patterson v. Illinois*, 487 U.S. 285, 292-94, 108 S.Ct. 2389 (1998)]. However, when the police initiate questioning, a waiver of the right to counsel is only valid if the accused has not yet asked for a lawyer. *Id.* at 291, 108 S.Ct. at 2394.

*State v. Smith*, 193 Ariz. 452, 458-459, 974 P.2d 431, 437- 438 (1999).

The question whether a defendant has withdrawn his invocation of his right to counsel is determined on a case-by-case basis after reviewing all of the circumstances. "Once the defendant has initiated conversation about his case, the trial judge must determine whether, based on the facts and circumstances of each case, the defendant has knowingly and intelligently waived the right to counsel and the right to remain silent." *State v. Smith*, 156 Ariz. 518, 523, 753 P.2d 1174, 1179 (App. 1987), *disapproved of on other grounds by State v. Jonas*, 164 Ariz. 242, 792 P.2d 705 (1990). "Waiver of the right to counsel once invoked depends on the facts and circumstances of each case, including the background, experience, and conduct of the accused." *State v. Thornton*, 172 Ariz. 449, 453, 837 P.2d 1184, 1188 (App.1992), *quoting Edwards v. Arizona*, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883 (1981). *See also North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979). (No per se rule exists for waiver; it must be determined from the particular facts and circumstances of the case).